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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 609.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

EDMUND UNKART AND JACOB H. HENSCHEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 7, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Edmund Unkart & Jacob H. Henschen, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Chester A. Arthur, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and seventy-six, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN I. DAVENPORT.

The foregoing writ is hereby allowed.

N. SHIPMAN,
Judge.

2 (Endorsed:) U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Edmund Unkart & Jacob H. Henschen, defendants in error. Writ of error.

Due & timely service of the within writ of error is hereby admitted. New York, Nov. 1, 1876.

GEO. S. SEDGWICK,
Pl'ffs' Att'y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to forty-seven inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edmund Unkart and Jacob H. Henschen, defendants in error, and Chester A. Arthur, plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of New York, in the second circuit, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, A. D. 1876, to wit, of the 7th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that, heretofore, to wit, on the 10th day of June, 1874, in April term, A. D. 1874, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United court buildings, in the city of New York, came Edmund Unkart et al., by H. J. Bigley, their attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Chester A. Arthur, defendant, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

4 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the tenth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edmund Unkart and Jacob H. Henschen (No. 1), plaintiffs in this suit, come here into court, and by H. J. Begley, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the seventeenth day of October last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs, against Chester A. Arthur, the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the same day. That the defendant afterwards, by George Bliss, esquire, his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the sixteenth day of February, in the year of our Lord one thousand eight hundred and seventy-four, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court; which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the said plaintiffs accordingly, by H. J. Begley, their attorney, complain of the defendant in this suit, being in custody, &c., of a plea of trespass on the case for promises, for that, whereas, the said defendant, heretofore, to wit, on the day of the date of this declaration, to wit, at the city of New York, in the district aforesaid, was indebted to the

said plaintiffs in the sum of one hundred and ninety-nine and $\frac{4}{100}$ dollars, lawful money of the United States of America, for duties on certain merchandise, to wit, gloves, imported into and entered at the collection district of the United States for the city of New York, on or about the following dates, to wit, the 24th day of May, in the year one thousand eight hundred and seventy-three, in the following ships or vessels, to wit, the steamer Calabria, from Liverpool, unlawfully demanded, exacted, and received, at the city of New York aforesaid, in the district aforesaid, by the said defendant, then collector of the customs for the district aforesaid, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest in writing in due form of law.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the sum of money above mentioned when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of one thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant (although often afterwards requested so to do) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of one thousand dollars and therefore the said plaintiffs bring suit, &c.

H. J. BEGLEY,
Attorneys for the Plaintiffs.

5 (Indorsed:) 2677. U. S. circuit court. E. Unkart et al. vs. C. A. Arthur. No. 1. Declaration. Copy. H. J. Begley, No. 29 Nassau street, attorney for plaintiffs. To George Bliss, esq., def't's att'y. June 10, '74.

Plea.

6 United States circuit court, southern district of New York.

CHESTER A. ARTHUR
ads.
EDMUND UNKART & AL.

And the said defendant, Chester A. Arthur, by George Bliss, his at-

torney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff in this suit ha above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiff' do the like, &c.

GEORGE BLISS,
Defendant's Attorney.

To H. J. BEGLEY, Esq.,
Plaintiffs' Attorney.

7 (Indorsed:) 2667. U. S. circuit court. Chester A. Arthur ads. E. Unkartet al. Plea. George Bliss, attorney for defendant.

Due service of a copy of the within is hereby admitted.
New York, June 10, 1874.

H. J. BEGLEY.

You will please take notice, that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, June 10, 1874.
Yours, &.,

GEORGE BLISS,
Defendant's Attorney.

To H. J. BEGLEY, Esq.,
Plaintiffs' Attorney.

8 Therefore the issue above joined is ordered to be tried at a circuit court appointed to be held at the United States court-rooms on the 3rd Monday of October, A. D. 1875.

And now; to wit, on the 3rd Monday of February, A. D. 1876, being as yet of said October term, before the Hon. William J. Wallace, sitting as circuit judge, come the said parties, by their attorneys, and the said judge before whom the said issues were tried hath sent here his record had before him in these words, to wit:

Afterwards, to wit, on the same day and place, before the said judge, come the plaintiffs and defendant, by their attorney, and the jurors of the jury also came, who to speak the truth in this matter within contained being duly chosen, tried, and sworn, upon their oath say that said defendant did undertake and promise in matter and form as said plaintiffs have above declared against him, and they assess the damages at $115.31, principal, in gold coin, and 18.35 interest, in currency,

9 over and above their costs and charges in this suit expended, and for these costs and charges the sum of .

10 Therefore, it is considered that the said plaintiffs do recover against the said defendant their said debt, and also for their damages which they have sustained, as well on occasion of the detaining of the said debt as for their costs and charges by them about their suit in this behalf expended, by the said court now here adjudged to the said plaintiffs, and with their assent, which said debt, damages, costs, and charges in the whole amount to .

And the said defendant in mercy, &c.
Judgment signed this day of 187 .

Clerk.

11 (Indorsed:) U. S. circuit court. Edmund Unkart et al. vs. Chester A. Arthur. Judgment-record. Geo. Bliss, U. S. attorney. Filed Oct. 7th, 1876.

12 *Bill of exceptions.*

U. S. circuit court, southern district of New York, in second circuit.

EDWARD UNKART ET AL.
vs.
CHESTER A. ARTHUR, COLLECTOR, &C.

Be it remembered that afterwards this cause came on for trial, to wit, at the October term, 1875, of the U. S. circuit court for the southern district of New York, held at the court-rooms, New York City, before William J. Wallace, district judge, sitting as circuit judge, and a jury duly empannelled and sworn, said trial commencing on the third day of February, 1876, at said term, and continuing from day to day until the 8th day of February, 1876, when proceedings were had, exceptions taken, and a verdict rendered, and this bill of exceptions prepared, as hereinafter stated.

The plaintiffs, to maintain the issues on their part, produced evidence showing the importation of certain merchandise from a foreign
13 country into the port of New York, upon which an import-duty was assessed by the defendant, as collector of the port of New York, at the rate of 60 % *per centum* ad valorem. The said merchandise was included in an invoice to the plaintiffs from C. & F. Sudberry, Nottingham, England, dated May 1st, 1873, of which the following is a copy:

INVOICE.

CASTLE GATE & QUEEN STREET,
Nottingham, Ilkeston, May 1st, 1873.

Mess'rs E. Unkhart & Co., New York, bo't of C. & F. Sudberry, manufacturers of hosiery, gloves, ribb'd silk mitts, cuffs, &c.

100	18		4-4	3 12	
110	3	Ladies b'k patent gloves. Silk and cotton gloves,	5-1	15	3
125	28	made on frames. Silk not chief value	6-6	9 2	
135	29		7-6	10 17	6
140	12		8-	4 16	
145	67		9-6	31 16	6
185	14		12-9	8 18	6
228	32		6-9	10 16	
235	44	Silk and cotton gloves made on frames. Pearl silk	7-3	15 19	
250	17	chief value. Men's black	8-6	7 4	6
310	18		7-6	6 15	
320	16		8-8	6 18	8
325	12		9-9	5 17	
400	3		7-6	1 2	6
19 405	18		8-3	7 8	6
430	11	Colored: Ladies' sup'r col'd	7-6	4 2	6
275	17		11-6	9 15	6
	459	Dozs		145 16	11
		Disc't 3½ %		5 9	6
		1 case (6) 723		140 7	5
		Case 12-6, consul & comm'rs fees 13-10		1 6	4
				£141 13	9

Carriage to Liverpool. Shipping charges not known; charges forwarded.
June 21.

C. & F. SUDBERRY.

(Endorsements:) Appr. Please report if known as "Patent silk gloves," under Dec. June 21, '73. June 30, '73. They are.—W. B. H. June 17, '73.—M. L.

Case —△ ×723 W. as noted.—W. H. B.

(Endorsements:) Add duty $159.91.—C. W. Mead. Delivered, √ P. July 16.—J. H. Approved.—W'm A. Darling, appraiser.

I certify that this invoice was presented to the custom house on entry st'r Calabria, 21st day of May, 1873.

WILLIAMS,
Dy Col'r.

15 The plaintiffs were charged duty on a portion of said invoice at the rate of 90% of 35%, and upon the remainder thereof at the rate of 60% ad valorem. Upon liquidation of this last-named rate, plaintiffs in due season protested in writing, as follows:

NEW YORK, *July 12th*, 1873.

To the COLLECTOR OF CUSTOMS,
New York:

SIR: We hereby give you notice of dissatisfaction with the ascertainment and liquidation of or demand for duties at the rate of 60% ad valorem on one case marked "No. 723," containing gloves imported by us per steamer Calabria from Liverpool, and entered on the 20th day of May, 1873.

Because such merchandise being gloves and similar articles made on frames, not otherwise provided for, is only liable to duty under the 22nd section of the tariff act of March 2nd, 1861, and the 13th section of the tariff act of July 14th, 1862, at the rate of 35 per centum ad valorem (less 10 per centum, under the second section of the act of June
16 6th, 1872, as a manufacture of cotton, or which cotton is the component part of chief value).

We submit under compulsion to your ascertainment and liquidation on demand as aforesaid, and hereby give you notice that we intend this protest to apply to the above described entry and to all future similar importations by us under the aforesaid tariff acts, and also intend the duplicate protest herewith submitted for transmission to the Secretary of the Treasury under the rules of your office to be an appeal to him from your decision on this and on all such future entries as fully as if formally made on each entry thereof.

Respectfully,

E. UNKART & CO.,
By W. J. BEGLEY,
Att'y.

Thereafter plaintiffs appealed to the Secretary of the Treasury, who approved the decision of the collector, and thereafter this action was brought to recover the exaction alleged to be illegal by the aforesaid protest.

17 The plaintiffs then produced witnesses to show the character and description of the goods in controversy. That they were gloves the defendant conceded.

That they were gloves commercially known as "silk-plaited gloves," or "patent gloves," was also conceded by both parties.

Nor was there any controversy that said gloves were manufactured in part of silk and in part of cotton, and that these were made on frames.

Among the witnesses called and examined for the plaintiffs were the following, and during their said examination objections were taken and proceedings had as follows, that is to say:

JOHN DORCHER, sworn and examined for plaintiffs, said:

I was salesman for plaintiffs' firm. I am familiar with the classes of gloves sold by that firm. I could not identify any particular glove as identical in character with that numbered 100 on this (the above recited invoice). The way I get at the identity of gloves for purposes of
18 comparison is partly by reference to the correspondence of numbers of goods coming from same house abroad with numbers of the different lots of gloves in the invoice. I remember the quality of gloves from that house represented by the number. I knew the general character of the gloves which came to Unkart & Co. which correspond to the numbers, and I knew what numbers they received.

At this point plaintiffs' counsel produced several samples of gloves, and placed them and the invoice in evidence in the hands of the witness, and asked the following question: Take the first sample at hand, and say to what number on the invoice it corresponds.

(Objected to by defendant's counsel as leading; and also that the witness is not competent to testify on that subject, because he is to give an opinion based only on prices, and his opinion is no testimony as to the component material; and also that the samples were not in evidence, and could not be testified about. To be used in this manner as
19 evidence, the samples must be properly proven. If these or any other samples were to be used in place of the original goods, they can only be thus used as secondary evidence, and for this proper foundation must be laid.)

The court overruled the objection, and defendant's counsel duly excepted.

A. The witness then answered that one sample (sample 1) corresponded with No. 250 on the invoice; that another sample (sample 2) corresponded with No. 405; that another sample (sample 3) corresponded with No. 228; another sample (sample 4) with 235. Sample 5 corresponds with but is a trifle better than 110 on the invoice. No. 185 on the invoice is better than the samples. As to the rest, some are better and some are worse.

Q. (By plaintiffs' counsel, showing witness the above samples.) Please state what those gloves are as to their component material.

(Objected to as immaterial, irrelevant, and incompetent; which objection was overruled, and defendant's counsel duly excepted.)

20 The witness then went on to give the comparative value of the component material of the samples exhibited, and was subjected to an extended cross-examination upon the comparisons he had instituted as above stated between the samples exhibited and the numbers of goods on the invoice. The whole of said testimony was based on the above-described samples, and upon the assumption that the said samples were fair representations of the goods in controversy. As a foundation for this comparison, the plaintiffs, without further proof in that

respect, offered said samples in evidence as being samples of the goods upon which protest was made as above stated.

To this the defense objected that samples of the original goods or packages should be produced, and that for them nothing could be substituted as secondary evidence without proper foundation therefor being first laid.

The court ruled that if samples of the original goods were not produced, it was merely a circumstance for the jury to consider, but that the samples now offered could not be excluded as evidence, and
21 they were accordingly admitted in evidence. To this ruling and decision counsel for the defendant duly excepted.

Other witnesses were then called and examined for the plaintiffs, in the course of whose examination the plaintiffs' counsel produced in evidence samples of a like thread glove. Plaintiff then showed that the gloves in suit were a lisle-thread glove, with a plaiting of silk; that the lisle-thread glove was an article which contains no silk; and gave evidence tending to show the value of such gloves, and such value being given, was compared with the value of samples No. 1 to 5 above mentioned as in evidence, as showing the additional value imparted to the lisle-thread glove by the addition of the silk.

All this evidence was objected to by defendant as immaterial and irrelevant, but it was received, and defendant's counsel duly excepted.

Referring then to the comparisons thus instituted, and the relative values of the sample before the jury as above stated, plaintiffs'
22 counsel asked of one of plaintiffs' witnesses:

Q. Is it the admixture of silk in these gloves that constitutes their value, or do you have regard rather to the fineness of the thread?

(To this testimony the defendant's counsel objected upon the ground that the value of the articles upon which duty had been assessed was immaterial for the purposes of this case and was not in controversy, and also that plaintiffs should not be permitted to adduce testimony as to the comparative values of different kinds of gloves as bearing upon the question of the comparative value of component materials.

This objection was overruled, and the defendant's counsel duly excepted.)

The plaintiffs' witness then stated the values of different gloves without silk, and with silk, and these gloves were compared with the values of the gloves in question as stated in the invoice; and by this testimony it appeared that some gloves having no silk in them whatever, and made entirely of cotton, were of a value in some instances
23 equal to some of the silk and cotton gloves in controversy upon the said invoice, but cotton gloves were generally of a value less than the said invoice value. Evidence under this ruling was adduced on the part of the plaintiffs tending to show that the admixture of silk in the manufacture of such gloves increased their value. This evidence was controverted on the part of the defendant.

One witness, a New York dealer in gloves and hosiery, and who was not a manufacturer, was asked by plaintiffs' counsel—

Q. Do you know what kind of silk is used in the manufacture of that glove? (Referring to sample in evidence.)

A. The witness answers that he only knew from the manufacturer's description of it, and from general knowledge of the subject picked up in a long experience in the trade, and from a long experience as a buyer and seller of silk and cotton mixed goods.

Defendants' counsel then objected to the witness stating what kind

of silk was used, his testimony being hearsay and his opinion improper.

24 This objection was overruled, and defendant's counsel duly excepted.

The witness then continued and stated as to the process of manufacture and the silk used, the various kinds in various grades of gloves, and the percentages of silk used in different gloves, and as to labor, that some gloves are cheaper made than others.

This same witness said he had picked apart one of the foregoing samples (607 or 1) and had examined it. He was then asked by plaintiffs' counsel—

Q. In your opinion, which is the component material of chief value, the silk or the cotton?

(To this question the defendant's counsel objected, on the ground that the opinion of the witness was of no consequence, and that the witness was not shown to be competent to give an opinion.

Objection overruled, and defendant's counsel excepted.)

The witness said: In some of the gloves, possibly silk would be; in a majority it is cotton. I should think the chief value in them was cotton.

One of plaintiffs' witnesses was asked by plaintiffs' counsel—

Q. Have you ever dealt in the cotton yarn, such as enters into
25 the manufacture of the gloves, samples of which are before you (i. e., all these in evidence)?

A. No; not in as fine as that, not in that quality.

Question. (By the court.) Do you know from information acquired in your business as to the value of these various materials?

A. An approximation?

Question. (By the court.) Yes.

A. Yes; I think I do.

Question. (By the court.) Do you think you are able to give the value of the material from the information you have obtained?

A. Yes. I could safely buy it and sell it.

Q. (By plaintiffs' counsel.) What would such thread be worth a pound?

(Defendants' counsel objected that the witness was not shown to be competent to give evidence on that subject.)

The witness being allowed to answer said:

A. I should think from $1.40 to $1.60 to $1.75 a pound.

Other witnesses to whose competency no objection was made, testified such value to be from 60 c'ts to 80 c'ts per pound, which was about the value claimed to be correct by the defense.

The testimony of this witness as to the value of the silk thread
26 in the gloves sampled was about $5.50 per pound. There was a contrariety of testimony from the various witnesses throughout this case as to this value, it varying from $4.50 to $10 per pound, according to various witnesses. Plaintiffs called a number of witnesses who had been or were dealers in the article in question, and the general purport of their testimony was that the amount of silk as compared with the cotton in various samples varied from $\frac{1}{10}$ in the poorer grades to $\frac{1}{4}$ in the finer grades; that the cotton thread was worth from $1.40 to $1.80 per pound.

At the close of the plaintiffs' case the defendant moved that the court direct the jury to find a verdict for the defendant, upon the ground that the goods in question had not been shown to be liable to the rate of duty indicated by the protest, and that no case of illegal exaction of

duty had been made out upon which plaintiffs were entitled to go to the jury.

This motion was denied, and defendant's counsel duly excepted.

27 The defence then introduced witnesses whose testimony tended to controvert the evidence of plaintiffs' witnesses as to the value per pound of the silk and cotton which were the component materials of the goods in question, and also as to the comparative quantity of silk and cotton therein. Samples about which some of plaintiffs' witnesses had testified were dissected by defendant's witnesses and the silk and cotton separately weighed, and the proportions stated by the witnesses who weighed them.

The testimony adduced by the defendant tended to show that silk was the component material of chief value in all the plaintiffs' samples of the goods in controversy, and in fact of all silk-plaited goods of that character.

At the close of all the testimony, the defense renewed the motion to direct the jury to find a verdict for the defendant.

This motion the court denied, and defendant's counsel duly excepted.

28 Defendant's counsel then submitted that in any event all the goods in the invoice in question should have paid 50 per cent. ad valorem, if not a greater duty, and as it appeared that the duty paid upon the packages upon which it was now claimed by plaintiffs that they were entitled to a refund, added to the duty paid on so much of the invoice as was assessed at the rate of 35% less 10% was not in all equivalent to a duty of fifty per centum ad valorem upon such packages, that therefore no sufficient or legal duty had been paid by the plaintiffs, and that they could not recover. The defense claimed that the goods in the invoice being all of the same general character, and conceding them to be of the description claimed by plaintiffs, the duty assessed at 35% less 10% on a part thereof was insufficient, and not the legal duty; that fifty per cent. at least should have been charged, and should now be held to be the lawful duty upon the whole

29 importation in question. If it were so held, the plaintiffs could not recover, not having paid sufficient duty.

The court refused to direct a verdict for the defendant, and defendant's counsel duly excepted.

Defendant's counsel then asked the court to hold that the plaintiffs have made out no case.

The COURT. I think I shall let the jury pass upon the question as to whether silk is the component material of chief value.

Request denied. Defendant's counsel duly excepts.

The defendant's counsel then submitted the following requests or prayers for instruction, and asked the court to charge the jury in accordance therewith and in the terms of each thereof:

1. This being an action brought to recover an alleged illegal exaction of duty and upon the theory that the law implies a promise to

30 repay money unlawfully collected belonging to plaintiff, the plaintiff, to establish his case, must make out the illegality complained of.

2. In this case the plaintiff must show that his goods were of such a character that they were not dutiable at 60 per cent. ad valorem, but were dutiable at 90 per cent. of 35% ad valorem.

3. All gloves made of silk were, by the tariff in force at the time of the importation in question, dutiable at 60% ad valorem.

4. To render silk gloves dutiable at 60%, it was not essential that

they should be made wholly of that material. If they contained silk in sufficient merchantable quantity to render them gloves commercially designated as silk gloves, even after the admixture of cotton, then they were dutiable at 60%.

5. If, therefore, the gloves in question were commercially described as "silk-plaited gloves," or "plaited silk gloves," or "patent silk gloves," and gained a substantial element of their commercial
31 value from the circumstance that silk is an essential component material, then the gloves in question were properly assessed at 60%.

6. Gloves made of silk and cotton, but recognized articles of merchandise in this market for 15 or 20 years under the commercial designation of silk, are dutiable as silk gloves at 60%.

7. If in the gloves in question silk is the component material of chief value, then they were properly assessed, and in determining this question the cost of manufacture must be excluded and the comparison made solely between the value of the silk and cotton in the condition in which it enters as a raw material in the manufacture of the fabric in question.

8. In determining the relative value of the component materials in the gloves in question, the testimony of the value of a glove without silk, and the value of a similar glove with silk added, is not to be
32 taken by the jury as an index of the difference in relative value of the component materials, for there is no contradistinction in the evidence that the price or value of the manufactured glove depends on many other considerations than the cost of the raw material (e. g., the manufacture, &c.), and that the component materials, as compared to the price of the completed article, form a small element of value. (There was evidence to the effect stated in this request.)

9. If the jury are satisfied from all the evidence in the case that the value per pound of the silk in the gloves in question is represented by from $7 to $10, and of cotton by from 60 c'ts to $1 per pound, and that in fabrics of the character in question the silk is present in the proportion of ¼ to ⅓ of the cotton, then it is clear that the silk is of greater value than the cotton, and the component material of chief value, and the duty rightly assessed.

10. The burden of proof is upon the plaintiffs to make out their
33 case, which is to satisfy you by a fair preponderance of evidence that the gloves in question are not silk gloves, or gloves of which silk is the component material of chief value, within the rules above laid down.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: * * * * * * * *

In the first place I shall present briefly a recapitulation of several sections of the various acts imposing duties, which I think are germain to the controversy here, give you my conclusions, and thereupon present to you what I think is the only question of fact for you to determine, leaving you to determine that upon the evidence which has been adduced.

By the act of March 2d, 1861, Congress imposed a duty of 30 per cent. ad valorem upon gloves, irrespective of the material of which they were composed, and in 1862 an additional duty of (5) five per cent. ad valorem.

34 In 1872 Congress reduced existing duties upon gloves *upon* which cotton is the component part of chief value, 10 per cent.

So that, in the absence of other legislation affecting the merchandise in question, the duty which should have been exacted would be equivalent to 31½ per cent. ad valorem.

But by the act of June 30th, 1864, Congress imposed a duty of 60 per cent. ad valorem upon silk gloves, and upon other manufacture of silk or of which silk is the component material of chief value, not otherwise provided for, 50 per cent. ad valorem.

Upon the evidence here it appears that the gloves in question were not silk gloves, but were gloves composed partly of silk and partly of cotton, and were it not for the form of the protest made by the plaintiffs, I should hold that they were charg'able with a duty of 50 per cent. instead of sixty; that is, assuming that you should find as a matter
35 of fact that the component material of chief value in these gloves was silk, they should have been charged but 50 per cent. as upon a manufacture of silk not otherwise provided for, but plaintiffs have not based their protest upon that ground. If it had appeared in evidence here that the gloves in question were commercially known as silk gloves, then a different question still would arise. But that question is not here, it being conceded upon both sides that they are commercially known as a silk-plaited glove.

It results in this: that if you find that the component material of chief value in the gloves in question is silk, the plaintiff cannot recover here. On the other hand, if they were not of this description, they were only liable to pay a duty upon gloves, irrespective of the material of which they are composed, of 35 per cent. ad valorem.

But if you come to that conclusion, they are also entitled to the further reduction of 10 per cent. upon all manufactures of which
36 cotton is the component part of chief value, under the law of 1872.

It results, therefore, in view of the law as I construe it, and in reference to the protest of the plaintiffs in this case, that the only question for you to pass upon is, whether or not the gloves in question are a manufacture of which silk is the component material of chief value.

If you find that silk is the component of chief value in the articles imported by the plaintiffs, the defendant is entitled to a verdict; if you find that it is not, the plaintiffs are entitled to a verdict.

Now, the value of the component materials is to be determined as at the place and time of the importation of the materials. What then was the value of silk and of cotton thread at the city of New York in the spring of 1873, and what was the proportion of each used in the manufacture of the gloves in question?

Now, gentlemen, this presents a question of fact which deserves a very careful consideration at your hands. The plaintiffs introduce
37 merchants in the first place—dealers in gloves—who testify from their experience, and from examination of the gloves, that the value of the silk is from a tenth to an eighth of the whole value of the materials, and in support of this theory they testify that such gloves only cost about 10 per cent. more than gloves of similar finish made wholly of cotton.

The defendant introduces manufacturers of silk and cotton goods, who testify that the silk constitutes about ¼ in weight of the entire material. I don't mean to be accurate in the proportion which I give, but I say that the substance of the testimony of the manufacturers was that silk constitutes about a fourth in weight of the entire material. And then the defendant supplements his case by experts who have sep-

arated the materials in given samples, and they testify that the silk composes from about $\frac{1}{6}$ to about $\frac{1}{7}$ of the weight.

Well, gentlemen, it must be apparent at a glance that an anal-
38 ysis furnishes the most accurate means, the most reliable source of ascertaining in this case the true proportions of the two component parts. The dealers no doubt honestly believe that the silk constitutes not more than $\frac{1}{10}$ of the value; the manufacturers who were put upon the stand no doubt sincerely believe that it constitutes a third or a fourth in weight of the whole material; while these gentlemen who have subjected the article to a careful analysis seem to arrive at a conclusion considerably divergent from either of the other classes of witnesses. M'r Gibson analized sample 1012, which he testifies is substantially the same as sample No. 1, introduced by the plaintiffs, and he says that the silk stands as 1 to $6\frac{1}{3}$ of cotton; while M'r Le Seur, verifier in the appraiser's department, unraveled an entire glove—a silk and cotton glove—weighed the silk, and weighed the cotton, and he found that the silk weighed 11 grains and the cotton 75 grains.

39 In this view of the case the important question for you to determine as a question of fact is as to the value of the two components separately. How much is the silk worth that is used in these gloves, and how much is the cotton worth?

When you come to that question you find a great conflict in the testimony; witnesses for the plaintiffs testifying that the cotton is worth from $1.40 to $1.60 a pound now, and was worth about 10 per cent. more than in 1873; testifying that the silk is of superior quality and worth from $4.50 to $5.50; while the defendant's witnesses testify that the value of the silk is $7 to $10 a pound, and the cotton from 60 to 80 cents. This presents a question of fact for you to determine, and I do not propose, nor is it my province, to intimate any conclusion to which I may have arrived, even if I should entertain one upon this question.

In conclusion, gentlemen, I deem it my duty to instruct you as to the burden of proof in this case. The burden is upon the plaintiffs to
40 show that they have fulfilled all the formal, ordinary prerequisites to bringing this action, but upon the question involved here I deem it my duty to charge you that the burden of proof is upon the defendant to justify his exaction of the duty imposed, so that it is for you to be satisfied that the evidence fairly preponderate' in favor of the defendant in this case that the materials which are the component of chief value in the gloves in question are silk, otherwise the plaintiffs are entitled to a verdict, there being no question on the evidence but that the prerequisites in regard to which the burden rests upon the plaintiffs have been complied with.

Now, gentlemen, you will take this case. I know you will give it the careful consideration which it requires; the questions of evidence are not simple, and it is a case that deserves to be carefully weighed.

Defendant's counsel excepted to that part of the charge reciting the statute, and holding that there is a question of fact for the jury.

41 Also, to that part which says that but for the protest the court would hold the duty in this case to have been 50 per cent.

Defendant's counsel also excepted to that part of the charge which says that if it had appeared in evidence that the goods were commercially known as silk gloves, that question might have an effect upon the case, but that question is not presented here; defendant's counsel claiming, in accordance with testimony and concessions upon record, that if they were known as silk-plaited gloves, it would answer the same purpose.

Defendant's counsel excepts also to that part of the charge which says that if silk is not chief value, the goods are dutiable at 35 per cent., less 10, and indicating that it is only a question of fact which the court then submits to the jury.

Also, to the submitting of evidence which was excepted to when
42 the plaintiff gave it to the jury, as to the comparative values of silk and cotton from the opinions of the trade witnesses, and to submitting their evidence to the jury as bearing upon the question of the comparative value of the material.

Also, to that part which states that there is a great conflict of testimony as to the comparative value of the silk and cotton that enters into these gloves.

Also, to that part which indicates that the burden of proof is upon the defendant to justify his exaction, so that the jury in this case must be satisfied that the evidence fairly preponderates in favor of the defendant, to the effect that silk is the chief value, otherwise the plaintiffs would be entitled to a verdict.

Also, separately, to the refusal to charge the 1st, 2nd, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th of the prayers submitted, or each or any thereof.

43 The jury found a verdict for the plaintiffs in the sum of $115.31, principal, in coin, and $18.35, interest, in currency.

And inasmuch as the aforesaid several matters of fact and of law, and the said several exceptions do not appear by the record of said trial, therefore, on the prayer of the said defendant, by his counsel, the said judge has signed the foregoing as and for the bill of exceptions in this case, at the term aforesaid, and as and for the said the eighth day of February, 1876, before the jury left the bar.

WM J. WALLACE,
U. S. District Judge.

(Endorsed:) U. S. circuit court, southern district of New York. Edward Unkart & al. versus Chester A. Arthur, collector, &c. Bill of exceptions. George Bliss, United States attorney for the southern district of New York. Filed Oct. 4, 1876.

44 Supreme Court of the United States, of October term, in the yea of our Lord one thousand eight hundred and seventy six.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
ag'st
EDWARD UNKART & JACOB H. HENSCHEN,
defendants in error.

Afterwards, to wit, on the third Monday of said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Chester A. Arthur, by George Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid there is error in the several rulings of the court, to which exception has been taken, and that by the record aforesaid, in form aforesaid given, was given for the said defendants against the said plaintiff, whereas by law of the land the said judgment ought to have been given for
45 the said plaintiff in error against the said defendants in error; and the said plaintiff prays that the judgment aforesaid, for the

errors aforesaid, and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those things which he has lost by reason of said judgment.

GEORGE BLISS,
U. S. Att'y, for Pl't'ff in Error.

(Endorsed:) U. S. Supreme Court. Chester A. Arthur, pl't'ff in error, versus Edward Unkart et al., def'ts in error. Assignment of error. George Bliss, United States attorney for the southern district of New York. Filed Nov. 4, 1876.

46 UNITED STATES OF AMERICA, *ss:*

To Edmund Unkart & Jacob H. Henschen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday of October term, eighteen hundred and seventy-six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Chester A. Arthur plaintiff, and you are defendant in error, to show cause, if any there b·, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

N. SHIPMAN, *Judge.*

47 (Indorsed:) U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Edmund Unkart & Jacob H. Henschen, defendants in error. Citation.

Due & timely service of the within citation is hereby admitted.
New York, Nov. 1, 1876.

GEO. S. SEDGWICK,
Def's' Att'y.

48 Supreme Court of the United States.

CHESTER A. ARTHUR, PL'FF IN ERROR,
vs.
EDWARD UNKART & JACOB H. HENSCHEN,
def'ts in error.

And afterwards, to wit, on the third Monday of October, in October term, in the year of our Lord one thousand eight hundred and seventy-six, the said Edward Unkart & Jacob H. Henschen, by Geo. S. Sedgwick, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine, as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

GEORGE S. SEDGWICK,
Att'y for Def't in Error.

STEPHEN G. CLARK,
Of Counsel.

(Indorsed:) U. S. Supreme C't. No. 923. Chester A. Arthur, pl'ff in error, vs. Edward Unkart et al., def't' in error. Joinder in error. George S. Sedgwick, att'y for def't' in error. Filed 25 November, 1876.

(Indorsement on cover:) No. 609. Chester A. Arthur, collector of the port of New York, plaintiff in error, vs. Edmund Unkart and Jacob H. Henschen. S. New York C. C. U. S. Filed 7th November, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHESTER A. ARTHUR, COLLECTOR,
v.
EDMUND UNKART AND ANOTHER. } No. 609.

ERROR TO THE UNITED STATES CIRCUIT COURT SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHESTER A. ARTHUR, COLLECTOR,
v.
EDMUND UNKART AND ANOTHER. } No. 609.

ERROR TO THE UNITED STATES CIRCUIT COURT SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The issues in this case arose out of the importation into New York, in May, 1873, by E. Unkart & Co., of certain "silk-plaited gloves," upon which a duty of 60 per cent. was imposed, the importers claiming them to be subject to but 35 per cent., with a 10 per cent. reduction. They were made of silk and cotton together. They were but part of a single entry, partly assessed at 60 per cent. and the rest at the rate claimed by importers. (Record, 6, folio, 15.) The eighth section of the act of June 30, 1864, c. 171, cited in the two preceding cases just submitted—Nos. 517 and 518—imposes

upon various articles of clothing made of silk, including gloves, this rate of duty. The concluding clause is: "On all manufactures of silk, *or of which silk is the component of chief value*, not otherwise provided for, 50 per cent. ad valorem." (13 Stats., 210, § 8; R. S., sec. 2504, page 472, Schedule H.) The importers only protested against the liquidation of any part of their entry at 60 per cent. (Record, 6.) Had it been liquidated wholly at 50 per cent., they would have been obliged to pay more than they have paid to the collector. (Record, 10; folio, 28.) They claimed the goods which they thought had been over assessed were dutiable as "manufactures of cotton, or of which cotton is the component of chief value under § 6 of same act." (Record, 6, middle.)

The question as to which material, silk or cotton, was the component of chief value, was submitted to the jury. The government objected to the introduction of samples said by plaintiff's (Unkart's) witnesses to be *similar* to the articles imported, and to testimony showing the comparative values of such gloves, with and without the admixture of silk. (Record, 8.) That objection will be here renewed.

Various requests were made by the district attorney for rulings as to the amount of testimony required to justify a verdict for the plaintiff, and as to the burden of proof, and upon other subjects, as will appear in the errors assigned.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns for error the refusal of the judge to instruct substantially in conformity with the following requests, viz:

1. This being an action brought to recover an alleged

illegal exaction of duty and upon the theory that the law implies a promise to repay money unlawfully collected belonging to plaintiff, the plaintiff, to establish his case, must make out the illegality complained of. (Record, 10, near bottom.)

2. In this case the plaintiff must show that his goods were of such a character that they were not dutiable at 60 per cent. ad valorem, but were dutiable at 90 per cent. of 35 per cent. ad valorem. (Record, 10, bottom.)

3. If in the gloves in question silk is the component material of chief value, then they were properly assessed, and in determining this question the cost of manufacture must be excluded, and the comparison made solely between the value of the silk and cotton in the condition in which it enters as a raw material in the manufacture of the fabric in question. (Record, 11.)

4. In determining the relative value of the component materials in the gloves in question, the testimony of the value of a glove without silk, and the value of a similar glove with silk added, is not to be taken by the jury as an index of the difference in relative value of the component materials, for there is no contradiction in the evidence that the price or value of the manufactured glove depends on many other considerations than the cost of the raw material (*e. g.*, the manufacture, &c.), and that the component materials, as compared to the price of the completed article, form a small element of value. (There was evidence to the effect stated in this request. *Ibid.*)

5. The burden of proof is upon the plaintiffs to make out their case, which is to satisfy you by a fair preponderance of evidence that the gloves in question are not silk gloves, or gloves of which silk is the component ma-

terial of chief value, within the rules above laid down. (*Ibid.*)

6. The plaintiff in error also assigns for error the reference by the court to the acts of March 2, 1861, and of July 14, 1862, as "germane to the controversy here." (Record, 11, bottom.)

7. To the instruction given the jury that "upon the evidence here it appears that the gloves in question were not silk gloves, but were gloves composed partly of silk and partly of cotton; *and were it not for the form of the protest made by the plaintiffs*, I should hold that they were chargeable with a duty of 50 per cent. instead of 60; that is, assuming that you should find as a matter of fact that the component material of chief value in these gloves was silk." (Record, 12, near top.)

8. To the following instruction, as to the burden of proof, viz: "In conclusion, gentlemen, I deem it my duty to instruct you as to the burden of proof in this case. The burden is upon the plaintiffs to show that they have fulfilled all the formal, ordinary prerequisites to bringing this action; but *upon the question involved here I deem it my duty to charge you that the burden of proof is upon the defendant to justify his exaction of the duty imposed, so that it is for you to be satisfied that the evidence fairly preponderates in favor of the defendant* in this case, that the material which is the component of chief value in the gloves in question is silk, otherwise the plaintiffs are entitled to a verdict, there being no question on the evidence but that the prerequisites in regard to which the burden rests upon the plaintiffs have been complied with." (Record, 13; folio 40.)

BRIEF.

I.

As indicated in previous arguments (No. 517 and 518 of current term) the government contends, upon the authority of Smythe *v.* Fiske (23 Wall., 381, top), that the tariff act of July 30, 1864, c. 171, intended an entirely new classification of dutiable articles—so far as fabrics made of silk or cotton are concerned, at least—according to material. The eighth section included all articles made of silk or of which it was the component of chief value; while the concluding clause of the sixth section (13 Stats., 209, middle) provided that all "manufactures of cotton, not otherwise provided for," should pay "35 per centum ad valorem." It will be noticed that it does not say "or of which cotton is the component of chief value." If gloves partly of silk, but the greater value of which is cotton, are non-enumerated, then they come under the similitude clause of the act of the act of 1842, c. 270, § 20 (5 Stats., 565, middle, now found in R. S., sec. 2499), which requires "the same rate of duty which is levied on the enumerated article which it most resembles" "in material, quality, texture, or the use to which it may be applied;" "and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles *paying the highest duty;* AND ON ALL ARTICLES MANUFACTURED FROM TWO OR MORE MATERIALS, THE DUTY SHALL BE ASSESSED AT THE HIGHEST RATES AT WHICH ANY OF ITS COMPONENT PARTS MAY BE CHARGEABLE."

There is no enumeration of cotton gloves, nor of gloves generally, in this act of June 30, 1864; therefore silk gloves are the specific enumerated article which these importations most nearly resembled, and were therefore dutiable at 60 per cent. under either clause of this similitude section. The reference to the acts of 1861 and 1862, upon which alone the plaintiff recovered, was unauthorized.

II.

The reception in evidence of gloves not part of the importation in question, coupled with proof that they were *similar* to the importations, was unauthorized. It was like the admission of independent writings, the genuineness of which is disputed, and are proved only by evidence, in order to make them a standard of comparison. This has been held improper. (Moore *v.* United States, 91 U. S., 270.)

It compelled the jury to decide first whether the gloves exhibited were like those appraised, and then as to their composition.

The whole of the testimony introduced was as to the relative value of materials in certain gloves *not* part of the importation mentioned. That they were similar rested wholly upon the statement of a witness whom the government practically was unable to contradict. The withholding of a sample of the actual importation was the act of the importers, and they should be held responsible for any consequent inconvenience in proving their case by competent evidence.

III.

The court should have recognized the principle contended for in the seventh and eighth requests, that the cost of manufacture should be excluded as an element of value.

It is the article in which *silk* as a raw material, and not silk-*thread* or cotton-thread, is the component material of chief value that is to be assessed at 50 or 60 per centum.

IV.

How by any form of protest the plaintiffs could diminish or affect the rate at which their importation was dutiable is not perceived, nor the propriety of the judge telling the jury that "were it not for the form of protest made by the plaintiffs I should hold that they were chargeable with a duty of 50 per cent. instead of 60." (Record, 12, near top.) Fifty per cent. upon the whole entry would exceed the sum paid by Unkart & Co.; but the language and ruling of the court excluded the jury from the consideration of this defense.

V.

Perhaps the most important question is that relating to the burden of proof, throwing it "upon the defendant to justify his exaction of the duty imposed," and requiring a preponderance in the defendant's favor, and him to show that the gloves were chiefly of silk.

1. The case of a collector of customs is unlike that of a collector of taxes. Confessedly, *some* duty is chargeable upon the importation. It is a question upon which (as appears by this record) the trade, manufacturers, and experts differ as to the proper rate. If parties do not appeal to the Secretary of the Treasury within a very brief period, the liquidation of the collector becomes final and conclusive; if they do appeal, and his action is confirmed, the decision of the Secretary is final and conclusive, unless suit is brought within a few months. That the mere commencement of the action can entirely nullify a decision which would otherwise be final can hardly be supposed. The bringing of the suit prevents the decision from becoming final, and leaves it only prima-facie proof of the correctness of the collector's action. It is the determination of the Secretary, acting judicially, upon the conduct of the collector and the correctness of his assessment.

2. The burden of proving his case rests wholly and throughout upon the plaintiffs. It does not shift.

This action is, in the first count, for money said to have been "unlawfully" exacted by the defendant; and, in the second count, for money had and received, &c. (Record, 3.)

The defendant is alleged to have been acting officially. (*Ib.*) The presumption is that a thing done officially is done rightly; and he who asserts the contrary, and that it was done "unlawfully," should certainly be held to prove it. (Bingham *v.* Potter, 14 Gray, 522; Fiske *v.* N. E. Ins. Co., 15 Pick., 317; Greenl. on Ex., § 80.) When he has simply shown a payment of money, he has shown no right to its recovery; for the presumption

is that it was lawfully paid and received. (Clapp *v.* Thomas, 5 Allen, 161, bottom.) Nor does it alter the case that he shows it was paid to obtain possession of goods, if it be also admitted that the payee was entitled to retain them until *some* payment was made; for it was not duress unless the amount demanded was excessive; and this is the very thing the plaintiff must prove by a preponderance of evidence to entitle himself to a recovery.

A tax-gatherer is not authorized to receive *any* money from a citizen, unless under a lawful precept. It is a levy not necessarily attaching to any particular person or property. But it is not so as to goods admitted to be dutiable at *some* rate. The issue to be proved is not, then, as to the *payment*, but as to its *amount*.

The ground taken by Judge Wallace requires the collector and the jury to decide every doubtful question of FACT against the government or its representative, even when the party defendant. Conceding, for the sake of the present argument *only*, that an uncertainty as to the liability of person or property to *any* tax or duty under the statute is a question of law, which, in such cases of doubt, is to be decided against the levy, or that the doubtful phraseology of a statute be so construed; it by no means follows that when the question is simply as to the *amount* properly collectible, and this is dependent upon the *fact* of the relative values of the material of which the article taxed is composed, that a doubt remaining as to this fact must go against the recipient of the money. The collector, acting officially, and presumed to be acting rightly, takes a certain sum. He is

in no doubt, and therefore has none to be given in favor of the importer. His action is declared correct by the Secretary of the Treasury. The payer of the money sues to recover it, averring as his sole ground of action the *fact* that the goods, on account of which he made the payment, were of silk and cotton mixed in such proportion that the latter was the component of chief value. Upon proof of this vital fact, alleged by him and denied by the collector, his case rests. Does not the fundamental rule of evidence require him to prove that which he has alleged by a preponderance of proof, and not that the defendant should overcome the assertion, and the evidence adduced to sustain it, by an amount of evidence more than sufficient to counterbalance that of the plaintiff? (Greenl. on Ev., § 74; Thornton *v.* Adams, 11 Gray, 393.)

Would the plaintiffs have dared to rest their case upon proof of the payment made by them under protest and appeal? If they first introduced evidence as to the component materials of these gloves, it was because they understood the burden to be upon them to prove their allegation. If they were not required to have the preponderance of the testimony on this point with them when the case was closed, they were not obliged to make out a prima-facie case in this respect at the outset. (Greenl. on Ev., § 74, notes, and cases cited.)

EDWIN B. SMITH,
Assistant Attorney General.

S. Hamilton's Son, Printer, 61 Cedar Street, N.Y.

In the Supreme Court.

CHESTER A. ARTHUR, Collector, &c.,

Plaintiff in Error,

vs.

EDMUND UNKART, *et al.*,

Defendants in Error.

No. 609.

STATEMENT.

The Act of March 2, 1861, (12 Stat. at Large, 178), provided a duty of thirty per centum in section 22, on many articles, and among them "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women or children, and not otherwise provided for." (*Id.*, page 191, near middle).

The thirteenth section of the Act of July 14th, 1862, (12 Stat. at Large, 543, 556), increases this duty by the same descriptive terms five per centum *ad valorem*.

By the Act of June 6, 1872, (17 Stat. at Large, 230), the duty upon manufactures of cotton, having cotton as the component of chief value, were reduced ten per cent.

Defendants in error imported certain merchandise, upon which the plaintiff in error assessed a duty of sixty per centum, (Record, fol. 15).

Against the imposition of this rate of duty the importers protested. The protest is given at fols. 15 and 16 of the record.

Upon the trial it appeared and was conceded that the merchandise in question were gloves; that they were commercially known as "silk-plaited gloves," or "Patent-gloves;" that they were manufactured in part of silk, and in part of cotton, and were made on frames. (*Record, fol.* 17).

The record does not specifically show unless by the invoice (Rec., fol. 13). that the gloves were to be worn by men, women, or children, but, that that is their use, we assume the Court will take judicial cognizance.

These facts having been conceded or uncontradictedly proven, the only remaining question to be litigated was whether the cotton or the silk in these gloves preponderated in value. Upon this question both parties gave evidence (Record, fols. 21-26). This question was submitted to the jury, and was the sole question submitted to them (Record, fols. 29, 36, 39).

The jury found a verdict for the importers (Record, fol. 43). So that for the purposes of this case the facts as to the goods in question are conclusively settled to be, that the articles are gloves to be worn by men, women or children, made upon frames,—not in fact—silk gloves, nor known commercially by such appellation; and that of their component materials, cotton and silk, the cotton is of the greater and the silk of the less pecuniary value.

POINTS.

I.

We have seen that by the Act of 1861 cited, *supra*, gloves worn by men, &c., made on frames, of whatever material composed, were made liable to a duty of thirty per cent. Sec. 13 of the Act of July 14, 1862, 12 Stat. at large, 543, 555, further enacted as follows:

And be it further enacted, That from and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, a duty of five per centum *ad valorem*, that is to say: * * * * caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for.

The Revised Statutes contain a provision upon the same subject in these words "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, *except silk and linen*, worn by men, women, or children, and not otherwise provided for." (Rev. Stat. 478).

The exception italicized is new.

Section 8 of the Act of June 30th, 1864, provided among other things for silk gloves a duty of sixty per cent., and it was under this clause that the duty complained of was assessed. The goods were imported in 1873. Were it not for the exception found in the Revised Statutes, and the effect given to a similar exception referred to in the case of Smythe *vs.* Fiske, 23 Wall. 374, 382, it might well be argued that these gloves, even though of silk, was still dutiable under the earlier acts because the

Act of 1864 imposes a duty upon silk gloves, and is silent as to the process of manufacture, and although the gloves might be made of silk, or so commercially known, the fact that they were made on frames would be controlling.

But it is not necessary to argue this point because the verdict settles the question of fact that these gloves are neither silk by reason of component material, or silk by commercial designation or usage.

We submit then that the law is in fact, as the Revised Statutes express it. The exception shows the extent of the repugnancy between the Act of 1864 and the Acts of 1861 and 1862.

The goods in question not being a manufacture of silk and answering to all the requirements of the Acts of 1861 and 1862, are dutiable according to the rates therein prescribed.

The suggestion of the plaintiff in error, that they may be dutiable by similitude is not warranted, because they are enumerated if not as silk gloves, then as gloves made on frames. The similitude Act applies only to non-enumerated articles.

Stuart *vs.* Maxwell, 16 How. 150.
Morlot *vs.* Lawrence, 1 Blatch. 608.

II.

The reduction of ten per cent. claimed under the Act of 1872 was properly allowed because the verdict finds cotton to be the component of chief value. In other words, these gloves were "manufactures of cotton of which cotton is the component part of chief value."

Act of June 6, 1872, § 2, 17 Stat. at Large, 230.

III.

Although not formally assigned for error, counsel for plaintiff argue the question of the admissibility of samples.

The general evidence was to the effect that certain samples corresponded by invoice numbers with the goods imported, and were the same.

It was not necessary for the plaintiffs below to have introduced any samples; they could have proved by witnesses the character of the goods in question. That they gave the opposite party an opportunity to test their judgment by producing samples is no ground of complaint.

It appears from the charge of the Court that one of the Collector's witnesses subsequently testified to the correctness of at least sample No. 1 (Record, fol. 38).

The evidence was that sample No. 1 corresponded with No. 250 on the invoice (fol. 19). It may be inferred from all that took place that this sample, at least, was of the particular goods. The objection was general to all the samples offered together (fol. 21), and therefore should be overruled.

Moore *v.* Bank, 13 Pet., 302.
Camden *v.* Doremus, 5 How., 515.

So if the grounds stated are insufficient, it is not error, although other good grounds might have been stated.

Jackson *v.* Barron, 37 N. H., 494, 497, and cases cited.

III.

The rulings of the Court below as the method of computing values, and as to protest, are no ground of error.

IV.

So also in respect to the burden of proof.

Wilkinson *v.* Greeley, 1 Curtis, C.C., 441.
Lottimer *v.* Smythe, 17 Int. R. R., 13.

In the former cases Justice Curtis says, where the Collector was defendant "Acting in behalf of the Government, he has levied upon these commodities a duty of thirty per centum, he has compelled the plaintiffs to pay it. When any officer of the Government compels a citizen to pay a tax he may be required to show that it was exacted by authority of law."

The propriety of the ruling must be tested by the facts of the case.

It was conceded that the articles in question were not commercially silk gloves, or in fact made of silk —*prima facie*—they were then within the classification of the Acts of 1861 and 2, unless it could be shown that silk was of chief value; thereby perhaps taking them out of the classification of the Acts of 1861 and 2.

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